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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 475

BORG-WARNER CORPORATION, IN ITS OWN RIGHT AND AS SUCCESSOR TO THE MARVEL CARBURETER COMPANY,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No. 475

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Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims which was entered in the above cause on May 1, 1950, and became final by the denial of a motion for new trial on November 2, 1950.

Opinion Below and Basis for Suit

The Opinion of the Court of Claims (R. 11 to 39) is reported in 117 Ct. Cls. 1, 89 Fed. Supp. 1013. Suit was

brought under Private Act No. 127, 76th Congress, approved August 4, 1939.[1]

Summary Statement of the Matter Involved

Petitioner is an Illinois corporation, incorporated May 9, 1928. Marvel Carbureter Company was incorporated under the laws of Illinois on May 14, 1927, as the successor in interest of an Indiana corporation of the same name which had been incorporated on November 8, 1908. On June 5, 1928, all of Marvel's stock was acquired by petitioner and on July 24, 1936, petitioner acquired all of Marvel's assets and assumed all of its liabilities (R. 11, 12).

Marvel's principal business was the manufacture and sale of carburetors on a mass production basis (R. 13). In 1926, Marvel and one Chandler, who had a patent for a fuel pump or injector (hereinafter sometimes referred to as the Chandler injector) entered into a contract which provided for Chandler's employment by Marvel and gave Marvel a license under Chandler's patent (R. 14, 15). In the early spring of 1927, Marvel terminated this agreement with Chandler by giving him thirty days' notice in writing (R. 17). Shortly prior thereto, a representative of the United States Air Corps at McCook Field, Dayton, Ohio, had visited the Marvel plant at Flint, Michigan, and had been shown the Chandler injector. Accordingly, when Marvel decided to discontinue the development work on the injector, its Chief Engineer advised the Air Corps as follows (R. 17):

> "We are writing to advise that we have decided to discontinue the development work on the fuel injection

[1] A complete copy of the Act is attached as Appendix A, and a copy of the report of the Committee on Claims of the House of Representatives on the Act, (to which is appended the Senate Report on the Act), is attached as Appendix B. (See R. 13.)

device that the writer showed you at the time of your visit to our plant some six or eight weeks ago.

"It occurred to the writer that your department might be interested in making some arrangement with Mr. M. G. Chandler, who is now at liberty to consider something of this character as he has been unconditionally released from the arrangement with us."

Chandler met with the Air Corps' representatives at McCook Field on June 28, 1927. He went there on his own behalf and not on behalf of Marvel. His objective was to interest the Air Corps in building fuel injection devices that he would undertake to design but found that the Air Corps was interested only in developing sources of supply for such devices. Capt. T. E. Tillinghast, Chief of the Power Plant Branch at McCook Field, in turn requested Chandler to secure the cooperation of Marvel in such a project (R. 17).

Marvel cooperated by reemploying Chandler and delivering a device in August 1927. In November 1927 the device was subjected to bench tests with satisfactory results (R. 18).

By November 1929 the Air Corps considered the device of such importance that on November 28, 1929, it wrote Marvel as follows (R. 18, 19, and Appendix B, pp. 28, 36):

"1. With regard to the above development, it is the *desire of the Division* to impress on the Marvel Carbureter Company the *desire or demand for developing this project with the utmost haste.*

* * * * * * *

"4. The object of this letter is to advise Marvel Carbureter Company of the extreme importance at this time of the fuel metering pump *development and to request that, if possible, this project be given first priority in your experimental work.*" (Italics supplied.)

From the early part of 1930 through February 1936, great interest was shown in this development by engine manufacturers, airplane companies, foreign governments and their agents, brokers, etc. (R. 31).

On October 29, 1930, the Air Corps wrote Marvel's president in confirmation of agreements reached at a prior conference which included, among other things, the following (R. 19, 20, and Appendix B, pp. 28, 37, 38):

> "(a) That from a financial and development standpoint, the Materiel Division has been largely involved in the general development of the fuel charger, and that the Division's future plans and policies in connection with new engine development are obviously dependent, to a great extent, on the satisfactory completion of this equipment;
>
> "(b) *That* in view of the above the Division feels that the *Marvel Carbureter Company owes its first allegiance to the Division in such development, manufacture and deliveries;*
>
> "(c) That development and manufacture of equipment for the Wright R-1820 and the Curtiss Vee engines be given priority over any other project, and that this work be expedited with all possible speed;
>
> "(d) *That no other work in this connection be undertaken which could curtail the above development in any sense of the word;*
>
> "(e) That foreign or domestic development or sales be delayed until such time as the Army agrees that they will not affect procurement necessary for the Air Corps needs;" (Italics supplied).

A few months later, however, the Air Corps apparently decided that this agreement with Marvel was not enough protection. By letter dated March 21, 1931, Brigadier General Pratt, who had complete authority over the Wright

Field procurement division, notified Marvel as follows (R. 20; also Appendix B, pp. 28, 29, 38, 39):

> "* * * the Division, therefore, has classified all documents, technical data, reports and devices pertaining *to this development as 'Secret'*, which precludes demonstration and/or manufacture of it abroad. It also limits the commercial use of this device in the United States to specific applications which meet with the approval of the War Department. The Materiel Division undertook *this development* with this understanding."[2] (Italics supplied.)

In imposing these restrictions, however, General Pratt also apparently recognized that prolonged restriction could seriously injure Marvel because the same notice, after calling attention to the general policy with respect to restricting sales of equipment of military value, said: (R. 21, and Appendix B, p. 39)

> "* * * In this particular case, however, it is believed that the Air Corps will be compensated for its support of *this development if the release is withheld until the completion of a satisfactory Service Test.*" (Italics supplied)

Such a Service Test appears to have been completed some time prior to August 8, 1934, because an Air Corps' report of a conference on that date stated (R. 22, 23, and Appendix B, pp. 29):

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[2] In September 1933 the "Secret" classification was removed from correspondence, telegrams, etc. but left applicable to "drawings, technical reports, specifications" etc. (R. 21); in April 1934 the "Secret" status on "specifications, drawings and reports" was changed to "Confidential" with "secrecy" still applicable to "foreign and domestic sales" (R. 22); in January 1936 the Air Corps advised Marvel that "this development is still classified as a secret project in this Division" (R. 29); in December 1937 the Assistant Secretary of War advised Marvel that the development of this injector by the Air Corps was no longer in a "secret status" (R. 31).

"3. In response to an inquiry as to what their procedure should be relative to the further development of this device for use on the 14-cylinder engine, it was suggested that the project be reconsidered and that the Air Corps would prefer to work through the engine manufacturers. *This is particularly true in view of the fact that service tests and the development thus far had definitely established a military characteristic for the fuel charger*; * * *."[3] (Italics supplied)

But despite the completion of the service test the release was not forthcoming.[4] The reason apparently was that the injector was too valuable to the Air Corps. Under date of January 14, 1935, the Chief of the Air Corps wrote to the Chief of the Materiel Division of the Air Corps as follows (R. 27, also Appendix B, pp. 31, 42):

"1. In the light of such information as has been forwarded the Chief of Air Corps, the Marvel fuel injection system and its application to aviation is a marked advance. It is superior to any similar effort that has come to his attention. Its possession promises to be of great advantage to the Army Air Corps. In case of an emergency the utilization of this device may contribute greatly to the superiority of Army equipment over that of an aggressor. It, therefore, is desirable that *this important device be held for the exclusive use of the armed forces of the United States as long as such an advantage can be enjoyed.* Release for domestic and export sales cannot be granted at this time."[5] (Italics supplied)

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[3] It will be noted, however, from the Appendix B, p. 36, that a 14 cylinder injector was ordered from Marvel on June 29, 1935.

[4] Although many times requested (R. 24, 28).

[5] The Materiel Division of the Air Corps had recognized, in an interoffice communication, the unfairness to Marvel of the continued restrictions. In a letter dated October 3, 1934, to the Chief of the Air Corps, the Division said (R. 25, 26, Appendix B, pp. 30, 31, 41):

"4. The present status of the fuel injector, insofar as this Division is concerned, is that the Marvel Carbureter Company has the only

Concurrently the great value of the injector to the War Department, and its continued interest therein, were evidenced by the publication of its plans for much greater use of the injector in its airplane engines. Under date of December 21, 1934, the War Department published a report which stated, among other things: (R. 26, 27)

> "It has been tentatively planned that all engines procured after July 1, 1935, for single engined airplanes, will be equipped with fuel injection accomplished to meet the requirements of Specification 28169." [5a]
>
> * * * * * * *
>
> "* * * The services rendered by Mr. M. G. Chandler, the inventor of the injector which was developed and promoter of many valuable related ideas, and his co-worker, Mr. W. J. Cooke, were beyond evaluation in assuring the success of this project."

Marvel received no orders from the government for injectors atfer June 1935 (Appendix B, p. 36)[6] and having

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injector which can be approved for installation on Air Corps equipment at this time. However, it is anticipated that within a year or so, Eclipse Aviation Corporation, and possibly United American Bosch Corporation and Wright Aeronautical Corporation, will have developed their injectors to the point where they will be satisfactory.

* * * * * * *

"7. * * * From the above it is apparent that one of two things should be done in cases of this kind: (a) Allow the manufacturer to sell his product when he wishes, (b) Pay full development costs. * * *"

[5a] Also prior to August 31, 1934, the Air Corps had advised engine manufacturers as follows (R. 24, 25):

> "1. It is contemplated that for F.Y. 1936, all engine designs for single-engine tactical airplanes shall incorporate fuel injection as an integral part. At the present time, an approved type of fuel injector is manufactured by the Marvel Carbureter Company of Flint, Michigan."

[6] Subsequent orders were for parts and services (R. 30, 31).

completed all of its contracts with or for the government, Marvel was compelled to close down the Chandler project at the end of 1936 (R. 30, 31).[7]

While Marvel's device was subject to security restrictions, which prevented Marvel from exploiting it commercially, the so-called floatless carburetor" was perfected. This device eliminated the difficulties formerly existing in carburetors and superseded fuel injection systems (R. 33).

The United States received valuable benefits from the development. Such benefits included the "know-how" of fuel injection systems used for aeronautical purposes (R. 33), and the basic data necessary for the formulation of performance specifications for fuel injection systems which were available for, and were used in obtaining, fuel injection devices used on the famous B-29 airplanes during World War II. In addition, the Army Air Corps received a further indirect but extremely valuable benefit through the stimulation given to the carbuetor manufacturing concerns, (Appendix B, pp. 32, 43) as a result of which they were able to overcome the difficulties inherent in the conventional carburetor when used for aviation purposes and to perfect the so-called "floatless carburetor." In the meantime, it had the great benefit of maximum security in that it had the exclusive possession of a device which was superior to any similar effort that it knew about and which it thought would "contribute greatly to the superiority of army equipment over that of an aggressor" (R. 27). In addition, respondent *saved* development costs by having the development work done by Marvel.

The lower Court did not find the amount of petitioner's loss but, for the purpose of its decision, apparently assumed

[7] Although the project was closed down, Marvel still had to furnish replacement parts for, and service certain devices which had been delivered prior to 1937. The parts were on hand when the project was closed down (R. 31).

that Marvel expended a sum "largely in excess of the amount received from the Air Corps and the Navy" (R. 36).

It is petitioner's contention that these facts establish a contract implied in law in that respondent "received a benefit" the retention of which, without restitution, would be inequitable.

Jurisdictional Statement

The judgment of the Court of Claims was entered on May 1, 1950 (R. 38). A Motion for New Trial was filed on May 22, 1950, and denied on October 2, 1950 (R. 39). The jurisdiction of the Court is invoked under the Special Jurisdictional Act, under which this suit was brought, and Section 1255 of Title 28 U. S. C. That Jurisdictional Act provides for review "as in the case of claims over which such Court has jurisdiction under Section 145 of the Judicial Code, as amended."[8]

Question Presented

The fundamental question in this case is whether or not the Court of Claims, after it had been delegated jurisdiction by the Congress to determine the amount equitably due, notwithstanding any limitation on its jurisdiction with respect to claims upon contracts implied in law, can nevertheless ignore the mandate of the Congress and refuse to apply equitable principles applicable to contracts implied in law.

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[8] See Appendix A. Effective June 30, 1926, the Congress consolidated and codified the general and permanent laws of the United States in force on December 7, 1925. Such laws included Section 145 of the Judicial Code which provided for jurisdiction of the Court of Claims and the Act of February 13, 1925, which provided for review on certiorari of cases over which the Court of Claims had jurisdiction. In the said consolidation and codification, Section 145 of the Judicial Code and the Act of February 13, 1925, were codified as Sections 250 and 288, respectively, of Title 28 U.S.C. Under Chapter 646 of Public Law 773, 80th Congress, 2nd Session, the said Sections 250 and 288 were enacted into law as Sections 1491 and 1255, respectively, of Title 28 U.S.C.

The Jurisdictional Act authorized the Court of Claims to "render judgment in such amount as it deems may be *equitably due, notwithstanding* * * * *any limitation upon the jurisdiction of such court with respect to claims upon any contract implied in law*, upon the claim of" petitioner in its own right and as successor to Marvel "against the United States *in connection with the development* of fuel injection systems for use on military aircraft; provided, however, that such damages shall not exceed the actual moneys expended by the said Borg-Warner Corporation and the Marvel Carbureter Company in connection with this said development during the calendar years 1927 to 1936 inclusive."[9]

Suit was brought under this Act and petitioner submits that the lower Court erred in failing and refusing to determine the amount "equitably due" without regard to any limitation on the Court's jurisdiction with respect to claims "upon any contract implied in law."

Specification of Errors to Be Urged

The Court of Claims erred:

1. In completely ignoring the mandate of the Congress to determine the amount "equitably due" as provided in the Jurisdictional Act.

2. In failing and refusing to determine the amount "equitably due" without regard to "any limitation upon the jurisdiction of such Court with respect to claims upon any contract implied in law * * *."

3. In considering the matter only from the standpoint of the legal rights and remedies of the parties arising from their contractual relations as distinguished from equitable rights, contrary to the obvious intent of the Congress in passing the Jurisdictional Act.

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[9] See Appendix A.

4. In deciding the issue in this case upon the basis of principles applicable in cases involving contracts expressed or implied in fact, and in failing and refusing to apply the well-established principles of "quasi contracts" or "contracts implied in law."

5. In failing to consider whether, under all the facts, respondent had received a benefit the retention of which, without restitution, would be inequitable.

6. In concluding that respondent was not liable because "there was no representation by the Air Corps that it would reimburse the Marvel Company for its loss in case it did not sell enough of the devices to cover the cost of development," [10] a proper basis for the denial of a contract in fact but not a contract "implied in law."

7. In concluding that respondent was not liable because "nothing was done from which the Marvel Company had any right to conclude that the Air Corps would reimburse it for any loss it might incur," [11] a proper basis for the denial of a contract in fact but not a contract "implied in law."

8. In concluding that respondent was not liable because "there was never an intimation that it [the Air Corps] would guarantee the company against loss," [12] a proper basis for the denial of a contract in fact but not a contract "implied in law."

9. In concluding that respondent was not liable because it "did not expressly or impliedly promise to continue to purchase these devices if a better one became available, nor did it delude plaintiff into believing it would," [13] a proper basis for the denial of a contract in fact but not a contract "implied in law."

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[10] Op. R. 36.
[11] Op. R. 36.
[12] Op. R. 36.
[13] Op. R. 37.

Reasons Relied On for the Allowance of the Writ

1. THE LOWER COURT IGNORED THE CLEAR MANDATE OF THE CONGRESS TO DETERMINE THE AMOUNT "EQUITABLY DUE."

It is clear from the Committee Reports, that a fairly complete record of the dealings between the parties and the War Department's inter-office communications with respect to the Chandler Fuel Injector project was submitted to the Congress in a letter dated March 28, 1939, from the Secretary of War to the Chairman of the Committee on Claims, United States Senate. This letter is incorporated in and made a part of the Report which states:

> "The facts are fully set forth in the following letter from the Secretary of War which is appended hereto and made a part of this report" (See Appendix B, p. 33).

The original Bill in the Senate included a provision which would have authorized the Court to render judgment for such sum as it might have found to be equitably due for the "taking and impounding" under the Espionage Act of all matters pertaining to the development of fuel injection systems for use on military aircraft (Appendix B, p. 43). The Secretary of War objected to this provision but did not object to a determination that the government was "morally and equitably liable." After a detailed recitation of the facts, the Secretary summed up the position of the War Department as follows:

> "So far as the War Department is informed, the Marvel Carbureter Co. did everything in its power to maintain secrecy concerning the fuel-injector development. In other words, it did not violate the Espionage Act. But it is the view of the War Department that a compliance with a criminal statute should not create a claim against the Government. Under the Neutrality Act a license must be secured from the

Secretary of State to export certain implements of war. Would the Congress recognize a claim for lost profits occasioned by the refusal to grant a license to export implements of war? The recognition of such a claim would appear to be contrary to public policy. So in this case it is the view of the War Department that the claim should not be based upon any alleged taking or impounding under the Espionage Act.

"The only question is whether, under all of the facts, the Government is *morally and equitably liable for money expended by the Marvel Carbureter Co. in the development of fuel chargers which has not been recovered by the sale of the developed product.*

"As so limited the War Department has no objection to the reference of the matter to the Court of Claims for determination." (Italics supplied.)

The Congress accordingly eliminated the provision to which the Secretary objected and directed the Court of Claims to render judgment in "such amounts as it deems may be equitably due" etc. and, for the purpose of this case, removed the limitation on the jurisdiction of the Court with respect to claims on "contracts implied in law."

The War Department had considered petitioner's claim only from the standpoint of legal rights and remedies. Without the Jurisdictional Act, petitioner obviously had no remedy in equity or on a contract implied in law because the United States had not consented to be sued in any Court on such a cause of action. The Congress took note of this situation, as evidenced by the following quotation from Senate Report No. 314 (Appendix B, p. 33):

"The War Department held the claim untenable, considering the matter only from the standpoint of legal rights and remedies of the parties arising from their contractual relations as distinguished from equitable rights."

It is clear from the above that the Congress must have felt that the government was "morally and equitably liable" and that it intended to give the Court a mandate to determine the amount, if any, by which the money expended by Marvel exceeded its sales "of the developed product."

The lower Court not only failed to determine the amount of such excess but also, like the War Department had done before the Jurisdictional Act was passed, considered "the matter only from the standpoint of legal rights and remedies of the parties arising from their contractual relations as distinguished from equitable rights." The entire rationale of the lower Court's Opinion is devoted to the question of the legal rights and remedies of the parties arising from their contractual relations. Nowhere in the Opinion are any moral or equitable considerations mentioned. Petitioner respectfully submits, therefore, that the lower Court ignored the clear mandate of the Congress.

2. THE OPINION OF THE LOWER COURT IS IN DIRECT CONFLICT WITH ALL OF THE AUTHORITIES ON "CONTRACTS IMPLIED IN LAW."

(a) *The law of "contracts implied in law," ("Quasi Contracts")*

Lord Mansfield's opinion in the case of *Moses* v. *Macfarlan*, 2 Burr. 1005, decided by the Court of King's Bench in 1760 may be said to mark the emergence of "quasi contract" or "contract implied in law" as a distinct species of common law obligation which have been enforced ever since. He said:

> "* * * But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express, or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made

for the protection of persons under those circumstances. *In one word the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.*" (Italics supplied.)

More recently the principles of quasi contracts and their origin were succinctly summarized by Professor Woodward in his book "The Law of Quasi Contracts" (1913) (Sec. 4(2)):

"*Quasi contracts distinguished from contracts.*— Only within the last generation have quasi contractual obligations been commonly so called. They were formerly regarded as a species of contract, and to distinguish them from express contracts, and contracts implied in fact, i. e. contracts in which a promise is inferred from conduct, were called contracts implied in law. Since, like contracts proper, they were enforced by means of the action of assumpsit, it is not surprising that in a period when more importance was attached to the forms of legal remedies than to the nature of substantive rights, *the essential dissimilarity of the two obligations was not observed. The persistent failure to recognize it, however, has resulted in confusion and error, and in many cases has wrought serious injustice. It cannot be too strongly emphasized, therefore, that quasi contracts are in no sense genuine contracts.* The contractor's obligation is one that he has voluntarily assumed. He is bound because he has made a promise or undertaking that the law will enforce. And the only difference between an express contract and a contract implied in fact is that in the former the promise or undertaking is verbal, while in the latter it is an implication of the promisor's *conduct. But quasi contractual obligations are imposed without reference to the obligor's promise—it may be that he has explicitly refused to promise—but*

because he has received a benefit the retention of which would be inequitable." [14] (Italics supplied.)

(b) *The Court of Claims did not apply the principles of "Contracts implied in law"*

Petitioner submits that the Court of Claims failed to observe in this case "the essential dissimilarity of the two obligations" and, in so doing, "has wrought serious injustice."

The Court starts its Opinion by noting that the Jurisdictional Act in this case is different from the Jurisdictional Acts in other exceptional cases in that it gave the

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[14] See also Williston on Contracts (Rev. Ed. Williston and Thompson) Sec. 3 (1936); Restatement of the Law of Contracts, Sec. 5 (1932); Keener, Law of Quasi Contracts 16 (1893), Ames, History of Assumpsit, 2 Harv. L. Rev. at 64 (1888-89); Thurston, Cases on Restitution; 17 Corpus Juris Secundum, Contracts, Sec. 6 (1939); Wright "The Study of Law," 54 Law Quarterly Rev. 185 at 195; *United States* v. *Minnesota Mutual Investment Co.*, 271 U. S. 212 at 217, 70 L. ed. 911, 913; *Scheuley Distillers Corp.* v. *Kinsey Distilling Corp.*, 136 F. 2d 350; *Philpott* v. *Superior Court* (Sup. Ct. Cal.), 1 Cal. 2d 512, 36 P. 2d 635; *Hermann* v. *Gleason*, 126 F. 2d 936; *American LaFrance Fire Engine Co.* v. *Borough of Shenandoah*, 115 F. 2d 866; *Olsen* v. *Independent and Consolidated School Dist. No. 50 of St. Louis County* (Sup. Ct. Minn.), 220 N. W. 606; *Board of Highway Com'rs. Bloomington Tp.* v. *City of Bloomington*, 253 Ill. 164, 97 N. E. 280; *Brown's Estate* v. *Stair*, 25 Colo. App. 140, 136 P. 1003; *In re Farmers State Bank of Amherst*, 289 N. W. 75; *Goodall* v. *Warden's Adm'r*, 280 Ky. 632, 133 S. W. 2d 944; *Bruggeman* v. *Independent School District No. 4, Union Tp., Mitchell County*, 289 N. W. 5; *Board of Com'rs of Decatur County* v. *Greensburg Times*, 19 N. E. 2d 459; rehearing denied 20 N. E. 2d 647; *Bicknell* v. *Garrett*, 96 P. 2d 592; *Hardy* v. *Burroughs*, 251 Mich. 578, 232 N. W. 200; *Geo. B. Holman & Co.* v. *Graham*, 165 Misc. 389, 300 N.Y.S. 850; *Union Central Life Ins. Co.* v. *Glasscock*, 270 Ky. 750, 110 S. W. 2d 681; *Wilkes* v. *Stacy Williams Co.*, 179 So. 245; *American LaFrance & Foamite Industries* v. *Arlington County*, 192 S. E. 758; *Hyland* v. *Dewey*, 73 P. 2d 1038; *Armstrong* v. *Weiss*, 168 Misc. 653, 7 N.Y.S. 2d 26; *Cameron, to Use of Cameron* v. *Eynon*, 3 A. 2d 423; *Royal Indemnity Co.* v. *Sol Lustbader, Inc.*, 26 N.Y.S. 2d 328; *Hertzog* v. *Hertzog*, 29 Pa. St. (5 Casey) 465; *Smith* v. *Cheboygan State Sav. Bank*, 293 Mich. 131, 291 N W. 249; *Dysart* v. *Remington Rand*, 32 F. Supp. 477; *Graf* v. *Neith Coop. Dairy Products Ass'n*, 216 Wis. 519; 257 N. W. 618; *Blue Creek Development Co.* v. *Howell*, 101 W. Va. 748; 133 S. E. 699; *Edwards* v. *Surety Finance*

Court "jurisdiction to render judgment on any contract 'implied in law' between plaintiff and defendant." The Court then says: (R. 35)

> "This is the issue: Was there a contract implied in law?"

But the context of the Opinion from there on clearly indicates that the Court fell into the error against which Professor Woodward warned (see page 15, *supra*) because despite its correct statement of the question, the Opinion appears to be concerned primarily with the following questions:

1. Whether respondent had promised to "reimburse the Marvel Company for its loss" (R. 36).
2. Whether there was any intimation that the government would "guarantee the company against loss" (R. 36).
3. Whether the government expressly or impliedly promised "to continue to purchase these devices if a better one became available" or "deluded plaintiff into believing it would" (R. 37).
4. Whether a "contract implied in law can arise from the designation of this device, documents and data, as secret. (R. 37).

The first three bear on whether there was a contract expressed or implied in fact. They have no bearing whatsoever on the question involved herein, namely, whether there was a "quasi contract" or a "contract implied in law" for as all of the authorities agree such "obligations are imposed

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Co. of Seattle, 176 Wash. 534, 30 P. 2d 225; *Weatherly* v. *American Agr. Chemical Co.*, 16 Tenn. App. 613, 65 S. W. 2d 592; *Porter Const. Co.* v. *Berry*, 136 Or. 80, 298 P. 179; *In re Altmann's Will*, 266 N.Y.S. 773; *French* v. *Lewis and Clark County*, 87 Mont. 448, 288 P. 455; *Lamson* v. *Towle-Jamieson Inv. Co.*, 187 Minn. 368, 245 N. W. 627; *Cascaden* v. *Magryta*, 247 Mich. 267, 225 N. W. 511; *City of Pella* v. *Fowler*, 215 Iowa 90, 244 N. W. 734; see also, Article on Quasi Contracts "Change of Position," 45 H.L.R. 1333; Article on "Scope of Restitution and Unjust Enrichment," 1 Mo. Law 223.

without reference to the obligor's promise—it may be that he has explicitly refused to promise—but because he has received a benefit the retention of which would be inequitable." See pp. 15, 16, *supra.*

The fourth reason for the Court's conclusion as listed above, is simply a restatement of the position taken by the Secretary of War in objecting to the provision in the original Bill authorizing the Court to render judgment for a "taking and impounding" under the Espionage Act of all matters pertaining to the development of the Chandler fuel injector. This provision was eliminated in the final Bill. (See page 13, *supra*) Consequently, no claim could be, or ever was, predicated upon the imposition of the security restrictions by the War Department. The basis for claim under the Jurisdictional Act is that respondent received a benefit for which, in view of the circumstances, it should make restitution.

The security restrictions represented one of the circumstances but, without express Congressional authority, could not constitute a basis for a cause of action. Had the original Bill been passed, the cause of action would have been for the taking of plaintiff's property without regard to the benefit to the respondent. The present action is based upon the benefit to respondent and petitioner's out-of-pocket loss is merely a limitation on the amount of recovery. The two are separate and distinct concepts. The Secretary of War expressly recognized that the elimination of the provision with respect to "taking and impounding" still left the question of whether the government was "morally and equitably liable for money expended by the Marvel Carbureter Company in the development of fuel chargers which had not been recovered by the sale of the developed product," and the Congress accordingly directed the Court of Claims to render judgment on such basis.

It should be particularly noted that not a single authority or case on the law of quasi contracts is mentioned or referred to in the Court's Opinion. True, the Opinion gives lip service to some of the elements found in quasi contract cases such as "fraud, misrepresentation, or mistake" but the Court's commingling of these with the principles of contracts expressed or implied in fact and its conclusions show that it was not actually applying the fundamental law of quasi contracts in this case but, on the contrary, was simply applying the principles applicable in the cases of contracts expressed or implied in fact. For example, the following is illustrative: (R. 37)

> "In the absence of any promise, express or implied, on the part of the Government to pay plaintiff its losses, or of fraud, misrepresentation or mistake, or the like, no contract implied in law can arise."

Petitioner has never claimed that respondent ever actually, or by implication, promised to pay petitioner's losses. Furthermore, while the absence of such a promise might negative a contract in fact it obviously has no bearing on the question of whether there was a contract implied in law. Fraud, misrepresentation and mistake may be elements—but not the exclusive elements—of quasi contracts, but the commingling by the lower Court of such elements with the basic elements of a contract in fact indicates that the Court was thinking of "fraud, misrepresentation or mistake" as a basis for inferring an actual promise to repay petitioner's losses, something plaintiff has never claimed. This appears to be corroborated by the sentence in the Opinion immediately following the above-quoted sentence: (R. 37)

> "* * * The Government certainly did not expressly or impliedly promise to continue to purchase these devices if a better one became available, nor did it delude plaintiff into believing it would."

The above merely negatives an actual or implied promise to purchase—the basic element of a contract in fact but not of a contract implied in law with which we are here concerned.

Petitioner has never claimed that there was any intentional fraud or misrepresentation on the part of the United States or that any representation was ever made upon which petitioner had a legal right to rely. But it does claim that it reasonably misrelied, to its detriment and to respondent's great benefit, on reasonable inferences from statements made by respondent's agents with respect to timely release from the security restrictions and respondent's plans for exclusive use of the device on certain types of airplane engines.

As early as March 1931, Brigadier General H. C. Pratt, in charge of the Air Corps at Wright Field, indicated in a letter to petitioner that the Chandler injector development would be released upon "the completion of a satisfactory service test." In August 1934 the Air Corps said the "service tests and the development thus far had definitely established a military characteristic for the fuel charger" (R. 22, 23). In January 1935 the Chief of the Air Corps decided that "this important device" should "be held for the exclusive use of the armed forces of the United States as long as such an advantage can be enjoyed" (R. 27).

Marvel, however, was encouraged to continue by statements, particularly by letters to engine manufacturers (R. 24, 25) that the device was to be used exclusively on certain types of airplane engines for the fiscal year 1936. But no orders for injectors were received after June 1935 (see Appendix B, p. 36) and at the end of 1936 Marvel had to close down the plant because orders had completely dried up. A new device which had been developed while the Chandler injector was under restrictions was apparently

ready. The Air Corps and everybody else wanted this new device. No one then wanted the Chandler device per se, although the government continued to enjoy the intangible benefits of the development (even through World War II when it used them on the B-29s). *In other words, the Air Corps got everything it wanted at Marvel's expense* —namely, such security as this "important device" furnished against potential "aggressors" and the continuing intangible benefits of "know-how" and established specifications which proved so valuable in connection with the famous B-29s in World War II.

Such, petitioner submits, are the facts and circumstances which the lower Court should have considered, not whether respondent ever promised to pay or guarantee or purchase any particular quantities of devices. In turning its decision on whether there was an actual promise, therefore, the lower Court is squarly in conflict with all of the authorities and cases on quasi contracts.

(c) *That the Court failed to apply the principles of contracts implied in law is evident from numerous conclusions in the Opinion.*

After a brief recitation of some of the facts, the Court's Opinion says (R. 36):

> "However, there was no representation by the Air Corps that it would reimburse the Marvel Company for its loss in case it did not sell enough of the devices to cover the cost of development. There was no fraud practiced, there was no misrepresentation, there was no mistake; *nothing was done from which the Marvel Company had any right to conclude that the Air Corps would reimburse it for any loss it might incur.*"

This begs the question of whether there was a contract implied in law. That question is whether respondent received a benefit, the retention of which, without restitu-

tion, would be inequitable or, as stated by the Secretary of War, "Whether under all of the facts, the government is morally and equitably liable for money expended by the Marvel Carbureter Co. in the development of fuel chargers which has not been recovered by the sale of the developed product."

The next paragraph of the Opinion says (R. 36):

> "It is true that after Chandler had been reemployed the Air Corps continued to press the Marvel Company to proceed with the development of the device as rapidly as it was possible for them to do so, *but there was never an intimation that it would guarantee the company against loss.*" (Italics supplied.)

Again the conclusion has no bearing on the question of a contract implied in law. If there had been any such intimation as suggested by the Court there would have been a contract implied in fact and no need for the Jurisdictional Act.

The Court concludes that the facts do not make out a case of unjust enrichment because (R. 37):

> "* * * The Government purchased from plaintiff or its predecessor about a quarter of a million dollars worth of these devices, and no doubt would have made further purchases, except for the fact that the trouble with carburtors for gas engines had been eliminated, making the fuel-injector device no longer desirable. This was a risk that plaintiff ran and which it must have known it was running when it made its expenditures for the development of the device."

This treats the case as though it simply involved the formal contracts for the sale and purchase of specific devices. That, of course, would involve simply a question of contracts expressed or implied in fact and would be well enough if this case involved nothing more or less than such

formal contracts for the purchase of specific devices.[15] But this was not the case. It is quite obvious from the record that what the government wanted primarily was not just the mechanical devices but, as the Court finds:

> "Definite information as to the design of fuel injection systems and their advantages and limitations."

so that it could

> "Formulate performance specifications for fuel injection systems."

The Air Corps made this clear from the beginning when it emphasized its "desire or demand for *developing this project* with the utmost haste" (R. 18) and that Marvel "owes its first allegiance to the Division in such development, manufacture and deliveries" and should not undertake any other work "which could curtail the above *development* in any sense of the word; * * *" (Italics supplied) (R. 20).[16]

Respondent asked Marvel to incur the expense of this development from which it obtained the definite information it wanted. This Marvel did in the reasonable expectation either that it would be timely released or receive enough business from the government to amortize its costs.[17] The consideration which Marvel expected failed and Marvel was left with a loss. But respondent reaped great benefits

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[15] The Committee Report listed all the formal sales contracts and disposed of this point when it said (Appendix B, p. 33):

> "The War Department held the claim untenable, considering the matter only from the standpoint of legal rights and remedies of the parties arising from their contractual relations as distinguished from equitable rights."

[16] For additional evidence of respondent's emphasis on "development" see R. 18, 19.

[17] In a letter dated October 3, 1934, the Materiel Division of the Air Corps said that Marvel "obviously expected to make up this deficit on sales of this device to the government during the next few years." (R. 25).

and, therefore, should make restitution to plaintiff at least to the extent of plaintiff's out-of-pocket loss.

We have already referred to the statement in the Opinion that the government:

> "Did not expressly or impliedly promise to continue to purchase these devices if a better one became available, nor did it delude plaintiff into believing it would."

Obviously, if these things had been done there would have been an actual contract to purchase these devices. But the government made no such promise and did not delude petitioner into believing that the government would purchase such devices if a better one became available. It did, however, indicate to petitioner (undoubtedly in all good faith at the time) that there was a large potential business in the Air Corps itself and that it would therefore be to its advantage to continue the development work. Petitioner does not contend that defendant relied upon any promise that plaintiff would receive such business but that defendant, having received a benefit under such circumstances, is obligated to make restitution for the benefit, limited, however, under the Jurisdictional Act, to petitioner's out-of-pocket loss.

The Opinion says, in referring to respondent's call in 1934 for competitive bidding on engines supplied with a fuel injector (R. 38):

> "* * * This, however, is no cause for complaint because plaintiff knew other companies were working on the device, and there was no agreement on defendant's part that it would purchase only plaintiff's device even if a better one had been developed by someone else."

It is true that there was no such agreement. Again, the conclusion merely disposes of the question of a contract in fact and does not consider the question of whether under

all of the circumstances defendant received a benefit for which it should make restitution.

The foregoing, it is submitted, clearly shows that the lower Court's Opinion is in conflict with all the authorities on quasi contracts and that it did nothing more than the War Department had done before the Jurisdictional Act was passed, namely, consider the matter "only from the standpoint of legal rights and remedies of the parties arising from their contractual relations as distinguished from equitable rights")Appendix, p. 33). The effect of its Opinion is to treat the Jurisdictional Act as a nullity. Petitioner is entitled to have its claim adjudicated under that Act.

Respectfully submitted,

BORG-WARNER CORPORATION,
By CHARLES D. HAMEL,
LEE I. PARK,
F. WEAVER MYERS,
CLARENCE F. ROTHENBURG.

HAMEL, PARK & SAUNDERS,
Of Counsel.

APPENDIX A

AN ACT

To Confer Jurisdiction Upon the Court of Claims to Hear, Determine, and Render Judgment Upon the Claim of the Borg-Warner Corporation

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and render judgment in such amount as it deems may be equitably due, notwithstanding the lapse of time, or any statute of limitations, or any limitation upon the jurisdiction of such court with respect to claims upon any contract implied in law, upon the claim of the Borg-Warner Corporation, in its own right and as successor to the Marvel Carbureter Company (formerly a wholly owned subsidiary of the Borg-Warner Corporation), against the United States in connection with the development of fuel-injection systems for use on military aircraft: Provided, however, That such damages shall not exceed the actual moneys expended by the said Borg-Warner Corporation and the Marvel Carbureter Company in connection with this said development during the calendar years 1927 to 1936, inclusive.

Sec. 2. Such claim shall be instituted by or on behalf of the Borg-Warner Corporation within one year after the date of the enactment of this Act. Proceedings in any suit before the Court of Claims under this Act, and review thereof and payment of any judgment therein, shall be had as in the case of claims over which such court has jurisdiction under section 145 of the Judicial Code, as amended.

Approved, August 4, 1939.

APPENDIX B

HOUSE OF REPRESENTATIVES

Report No. 890

76th Congress, 1st Session

BORG-WARNER CORPORATION

June 21, 1939.—Committed to the Committee of the Whole House and ordered to be printed.

Mr. Keogh, from the Committee on Claims, submitted the following

REPORT

[To accompany S. 755]

The Committee on Claims, to whom was referred the bill (S. 755) to confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claim of the Borg-Warner Corporation, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

The purpose of the proposed legislation is to confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claim of the Borg-Warner Corporation against the United States "for just compensation for the damages inflicted and the losses sustained by the taking and impounding by the War Department, by virtue of the provisions of the Espionage Act (U. S. C., title 50, ch. 4, sec. 31), of all matters pertaining to the development of fuel-injection systems for use on military aircraft," such damages not to exceed actual moneys expended by the said company and its previously wholly owned subsidiary, the Marvel Carbureter Co., in connection with said development from 1927 through 1936.

This committee concurs in the recommendation of the Senate, and appended hereto is Senate Report No. 314, Seventy-sixth Congress, first session, which carries a detailed description of the facts.

[S. Rept. No. 314, 76th Cong., 1st sess.]

As amended, the War Department has no objection to the enactment of the bill.

In 1925 the Air Corps began development of a mechanical metering device to overcome difficulties encountered in use of carburetors during aerial tactical maneuvers. Two years later M. G. Chandler, who had entered the employ of the Marvel Co. under agreement for development of his patented "fluid distributing mechanism," presented for the Marvel Co. a design for fuel injector. On August 18, 1927, the Air Corps ordered from the Marvel Co. one fuel injector for a test engine. As development work progressed additional orders were placed with the Marvel Co. from 1927 through 1937.

November 26, 1929, the Matériel Division of the War Department wrote the Marvel Co. it was "the desire of the Division to impress on the Marvel Carburetor Co. the desire or demand for developing this project with the utmost haste." The stated object of the letter was to advise the Marvel Co. "of the extreme importance at this time of the fuel-metering pump development and to request that, if possible, this project be given first priority" in the company's experimental work.

With reference to a conference between representatives of the Marvel Co. and the Matériel Division, the latter wrote the company on October 29, 1930, that the Division had been largely involved in the general development of the fuel charger from a financial and development standpoint and the Division's future plans for new engine development depended largely upon completion of the equipment. Hence, "The Division feels that the Marvel Carburetor Co. owes its first allegiance to the Division in such development, manufacture, and deliveries," and "that no other work in this connection be undertaken which could curtail the above development in any sense of the word; that foreign or domestic development or sales be delayed until such time as the Army agrees that they will not affect procurement necessary for the Air Corps needs."

On March 21, 1931, the Matériel Division wrote the Marvel Co.:

"It is believed that the release of information which would enable a foreign manufacturer to parallel the development and application of the Marvel-Chandler fuel charger to aircraft engines, would not be to the best interests of the Air Corps at this time. The Division, therefore, has classified all documents, technical data, reports, and devices pertaining to this development as "secret," which precludes demonstration and/or manufacture of it abroad. It also limits the commercial use of this device in the United States to specific applications which meet with the approval of the War Department. The Matériel Division undertook this development with this understanding."

The secret classification and matters relating to the development, except drawings, technical reports, and specifications, was removed September 12, and the information conveyed to the Marvel Co. September 28, 1933.

April 21, 1934, the Air Corps advised the Marvel Co. of change in status of the development project from "secret" to "confidential," except it was to remain "secret" in connection with foreign and domestic sale. The Air Corps could not then favorably consider release of the equipment for foreign sale, but authorized divulgence to the Pan American-Grace Airways of such technical information as would enable them to determine the merits of the equipment and permit them to initiate negotiations regarding possible purchase for domestic use only. Negotiations for sale were not to be closed without Government approval, and the Division could not assure the company authority would be given for domestic sale.

The Matériel Division's report of a conference regarding the Marvel fuel charger on August 8, 1934, stated that in further development of the device for 14-cylinder engines, it was suggested the Air Corps would prefer to work through the engine manufacturers. The report continued:

"This is particularly true in view of the fact that service tests and the development thus far had definitely established a military characteristic for the fuel charger; that under the present development policy of the Matériel Division,

further expenditures for engineering and indirect costs were not warranted; that as a general rule in the procurement of accessories for engines or aircraft, the Matériel Division would prefer to procure a physical article and not endeavor to cooperate in the development of the article in the same manner as had been following in connection with the development of the Marvel fuel charger."

August 18, 1934, the Marvel Co. wrote the Matériel Division the device should be given complete release from secrecy to permit the company to recoup its development losses through general foreign and domestic sales, or such losses should be amortized through sales to the Government. The Division on October 3, 1934, wrote the Chief of the Air Corps as follows:

"The enclosed copy of letter from Marvel Carburetor Co., Flint, Mich., brings up a problem which the Air Corps must face in connection with strict adherence to the procedure of securing all production items of equipment through competitive bidding and for which it is apparent that a definite policy should be established for the guidance of this Division and in fairness to the manufacturers of aircraft, aircraft engines, and aeronautical equipment.

"From the enclosed letter, it may be seen that the Marvel Carburetor Co. has expended approximately $500,000 during the past 8 years to bring their fuel injector up to the point where it is considered satisfactory for adoption by the Air Corps. In addition to this amount of money, it should be borne in mind that the Air Corps has also spent a considerable sum of money in the development of this article. The manufacturer has received from sales to the Government approximately one-third of the amount of money he claims to have expended in this development and has obviously expected to make up this deficit on normal profits on sales of this device to the Government during the next few years.

"There are one or two other manufacturers entering the field of fuel injection and there is now on test at the Division a 9- and a 14-cylinder fuel injector manufactured by the Eclipse Aviation Corporation of East Orange, N. J.

While it is not the policy of this Division to reveal the engineering principles of one manufacturer to any of the others, it is quite evident that the manufacturer who enters the field last will benefit greatly by the advice of Division engineers by eliminating many of the mistakes made in the original development, thereby producing an article with much less engineering cost than was necessary for the original inventor and manufacturer. * * *

"This matter is being brought to the attention of the Chief of the Air Corps for the purpose of emphasizing the necessity for a definite policy to be followed in the development and procurement of such devices as fuel injectors, fuel pumps, vacuum pumps, and all other devices for which a functional service test is necessary before they can be standarized and for which development costs are necessarily high. From the above it is apparent that one or two things should be done in cases of this kind: (*a*) Allow the manufacturer to sell his product when he wishes; (*b*) pay full development costs."

After obtaining further information on the status of fuel-injector development, the Chief of the Air Corps on January 24, 1935 advised the Matériel Division as follows:

"In the light of such information as has been forwarded the Chief of Air Corps, the Marvel fuel-injection system and its application to aviation is a marked advance. It is superior to any similar effort that has come to his attention. Its possession promises to be of great advantage to the Army Air Corps. In case of an emergency the utilization of this device may contribute greatly to the superiority of Army equipment over that of an aggressor. It, therefore, is desirable that this important device be held for the exclusive use of the armed forces of the United States as long as such an advantage can be enjoyed. Release for domestic and export sales cannot be granted at this time."

In submitting the matter to The Adjutant General on May 15, 1935, the Assistant Chief of the Air Corps requested authority to negotiate a license with the Marvel Co., and further stated:

"The case in question is typical of the handicap which may devolve upon a contractor who undertakes development for the Air Corps.

"The Marvel Co. has, over a considerable period of time, been developing a fuel-injection system.

"At the time the development was undertaken no other promising development was in view.

"The cost and time of development has greatly exceeded all estimates.

"The development was important enough to be declared secret.

"There still is, according to the Marvel Co., a sum in the order of $500,000 which the Air Corps has not reimbursed the Marvel Co.

"The device is still so important that it should not be exported.

"*Other similar devices still not satisfactory to the Air Corps are being produced and are to be exported.*

"At the present, it is proposed to buy fuel-injection systems from an approved list established through passing Government requirements.

"The volume of business involved, however, will not take care of the entire amortization in the case of the Marvel Co.

"At some future date, the company feels that it has a case against the Government for damages."

Subsequently the Chief of the Air Corps was authorized to negotiate a license and same was offered by the Marvel Co. for $900,000. The offer was not accepted.

The result of the development work was to produce a fuel injector which functioned very satisfactorily on a 9-cylinder engine, but by the time this was completed the 9-cylinder engine had been superseded by 12-, 14-, and 18-cylinder engines. Experimental work continued for some time in an attempt to develop a fuel injector that would produce satisfactory results with the larger engines. In the meantime other concerns were working on the same problem. The possibility of substituting the fuel injector for the carbureter stimulated development in the latter art. As a result the Air Corps adopted a policy of combining this development with engine development. This

course was required inasmuch as the Air Corps could not secure fuel injectors to supply engine contractors for installation on completed engines.

In letter of January 27, 1938, the claimant corporation made demand on the War Department for money, labor, and material actually expended in development of fuel injectors in the amount of $506,320.75, claimed to represent the difference between total cost of development work from 1926 through 1936, less the amount received from sales. The War Department held the claim untenable, considering the matter only from the standpoint of legal rights and remedies of the parties arising from their contractual relations as distinguished from equitable rights.

In his report on S. 755 the Secretary of War suggests the bill should not be based on the Espionage Act, which is a criminal statute to augment the national defense through prohibition of certain acts. It is the view of the War Department that compliance with a criminal statute should not create a claim against the Government. As so limited the War Department has no objection to enactment of the bill.

The facts are fully set forth in the following letter from the Secretary of War, which is appended hereto and made a part of this report.

War Department,
Washington, March 28, 1939.

Hon. M. M. Logan, Chairman, Committee on Claims, United States Senate.

Dear Senator Logan:

Careful consideration has been given to the bill (S. 755, 76th Cong., 1st sess.) to confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claim of the Borg-Warner Corporation, which you transmitted to the War Department under date of January 18, 1939, with a request for information and the views of the Department relative thereto.

The bill authorizes the court to render judgment in such amount as may be equitably due as just compensation for

damages inflicted and losses sustained by the taking and impounding by the War Department, by virtue of the provisions of the Espionage Act, of all matters pertaining to the development of fuel-injection systems for use on military aircraft, notwithstanding the lapse of time, or any statute of limitations, or any limitation upon the jurisdiction of the court with respect to claims upon any contract implied in law. The bill provides a maximum amount which may be found to be equitably due by prescribing that damages shall not exceed the actual moneys expended by the Borg-Warner Corporation and the Marvel Carbureter Co., in connection with said development during the calendar years 1927 to 1936, inclusive.

In a letter dated January 27, 1938, the Borg-Warner Corporation made demand on the War Department for money, labor, and materials actually expended in the development of fuel injectors in the amount of $506,320.75. This sum is claimed to represent the difference between the total cost of development work for the years 1926 to 1936, inclusive, less the amount received from sales.

In reply to this demand the War Department advised the Borg-Warner Corporation that the claim was deemed to be untenable. In taking this position the War Department considered the matter from the standpoint of the legal rights and remedies of the parties arising from their contractual relations as distinguished from equitable rights. In the case of *United States* v. *Minnesota Mutual Investment Company* (271 U. S. 212), decided May 24, 1926, the Supreme Court held that:

"An implied contract in order to give the Court of Claims or a district court under the Tucker Act jurisdiction to give judgment against the Government must be one implied in fact and not one based merely on equitable considerations and implied in law."

The War Department has expressed no opinion upon the existence of any equities which may not form the basis of a claim against the Government under present law. In other words, it is an open question whether the Government should, by special legislation, authorize a court to pass upon

the equitable liability of the Government arising out of the facts in this case.

In 1925, the Air Corps began the development of a mechanical metering device to overcome difficulties encountered in the use of carburetors during aerial tactical maneuvers. In 1927, Mr. M. G. Chandler presented for consideration a design for a fuel injector. It appears that Mr. Chandler entered into an agreement on July 22, 1926, with the Marvel Carbureter Co., relating to United States Letters Patent No. 1,121,976, entitled "Fluid Distributing Mechanism," and upon the execution of this agreement he entered the employ of the Marvel Carbureter Co. for the purpose of completing the development of the fluid-distributing mechanisms and making improvements thereon.

The design presented by Mr. Chandler appeared to have desirable performance characteristics for metering and distributing fuel. On August 18, 1927, the Air Corps placed an order (purchase order No. 28-598) with the Marvel Carbureter Co. for one fuel injector for a single cylinder test engine. No formal written agreement was entered into at any time concerning the payment of any developmental costs by the Government. As development work progressed, additional orders were placed with the Marvel Carbureter Co. The dates, numbers, and articles ordered are as follows:

Number	Date	Description
28-598	Aug. 18, 1927	Single cylinder fuel injector and parts.
28-5417	June 27, 1928	Fuel-injector parts.
29-2352	Nov. 26, 1928	9-cylinder fuel injector and parts.
29-2828	Jan. 5, 1929	Fuel-injector parts for Curtiss D-12 engine.
30-4224	Apr. 9, 1930	Fuel-injector parts.
30-5241	May 28, 1930	Modification of fuel-injector parts.
30-5329	June 3, 1930	Fuel injectors and parts for Curtiss V-1570 and 2 each Pratt & Whitney SR-1340-C engines.
31-6006	June 4, 1931	Fuel-injector parts.
31-6014	....do.....	Fuel injector and parts for 1 each Pratt & Whitney R-1340-C engine.
32-105	July 3, 1931	Reworking 2 fuel injectors.
32-1082	Sept. 11, 1931	Fuel injectors and parts for 4 each Curtiss V-1570 engines.
32-1083	....do.....	Fuel injectors and parts for 4 each Pratt & Whitney SR-1340-E engines.
32-1084	....do.....	Fuel injectors and parts for 5 each Wright R-1820-E engines.
32-2266	Nov. 7, 1931	Fuel injector parts.
33-1095	Sept. 13, 1932	Do.
33-2850	Jan. 4, 1933	Do.

Number	Date	Description
35–152	July 20, 1934	Handbook of instructions for Q–2 fuel injector.
35–786	Sept. 15, 1934	Overhaul tools.
35–1532	Nov. 28, 1934	Fuel-injector parts.
35–2978	Mar. 26, 1935	Do.
35–3862	Apr. 25, 1935	Fuel-injector tool.
35–4534	June 7, 1935	Fuel-injector parts.
35–4766	June 29, 1935	T–1 fuel injector for 14-cylinder, 2-row radial air-cooled engine and S–2 fuel injector for 12-cylinder liquid-cooled engine.
36–1091	Sept. 14, 1935	Repair of Q–2 fuel injector.
36–4510	Mar. 25, 1936	Fuel-injector parts.
36–5571	May 15, 1936	Do.
38–887 [1]	Sept. 9, 1937	Do.
W–535 AC–4305	June 23, 1931	7 each type E–250 fuel injectors and parts for Pratt & Whitney SR–1340–C engines and 8 each type E–330 fuel injectors and parts for Wright R–1750–E engines.
W–535 AC–6069	June 28, 1933	37 each type M–5 (Air Corps designation Q–2) fuel injectors for Pratt & Whitney YR–1340–33 engines (increased to 39 quantity by change order No. 1).
W–535 AC–7625	June 17, 1935	25 Q–2 fuel injectors for Pratt & Whitney YR–1340–33 engines (designation changed to Q–3 by change order No. 1).

[1] Corporate name changed to Marvel-Schebler Carbureter Division.

On November 26, 1929, the Matériel Division wrote to the Marvel Carbureter Co. as follows:

"1. With regard to the above development, it is the desire of the Division to impress on the Marvel Carbureter Co. the desire or demand for developing this project with the utmost haste.

"2. The Air Corps has specified a new engine of superperformance in which a device of this type would be of inestimable advantage if tests, now proposed, indicate that the operation of this device is as satisfactory as is hoped at the present time.

"3. With the development in the nature of design proceeding as rapidly as it now is, it will be imperative to know definitely, within a short time, whether this device is feasible or not, and unless considerable test work can be done in the near future, a normal carburetor and manifolding system will necessarily be used, purely for lack of information on the fuel-metering system.

"4. The object of this letter is to advise Marvel Car-

bureter Co. of the extreme importance at this time of the fuel-metering pump development and to request that, if possible, this project be given first priority in your experimental work."

On October 18, 1930, the Marvel Carbureter Co. wrote:

"The writer had expected to receive from you a letter covering the details of our discussion concerning the fuel-charger situation, but to date this is not at hand.

"We would appreciate a letter from you confirming the various matters presented to the writer at our conference.

"We would also like to receive from you an outline that clearly defines your requirements with respect to Army priority considerations. This will be necessary as a means to guide our procedure and avoid misunderstanding. Also we will be interested to know just what latitude you will regard as equitable with respect to our conducting development tests of the fuel charger elsewhere on testing equipment that we do not have."

In response to the above letter the Matériel Division advised the Marvel Carbureter Co. as follows, on October 29, 1930:

"1. With reference to the above conference between Mr. Taft of the Marvel Carburetor Co. and Captain Page of the Matériel Division, the agreements as outlined below were reached and are now submitted for your consideration: (*a*) That from a financial and development standpoint, the Matériel Division has been largely involved in the general development of the fuel charger, and that the Division's future plans and policies in connection with new engine development are obviously dependent, to a great extent, on the satisfactory completion of this equipment; (*b*) that in view of the above the Division feels that the Marvel Carbureter Co. owes its first allegiance to the Division in such development, manufacture, and deliveries; (*c*) that development and manufacture of equipment for the Wright R-1820 and the Curtiss V engines be given priority over any other project, and that this work be expedited with all possible

speed; (*d*) that no other work in this connection be undertaken which could curtail the above development in any sense of the word; (*e*) that foreign or domestic development or sales be delayed until such time as the Army agrees that they will not affect procurement necessary for the Air Corps needs; (*f*) that authority to build in foreign countries in order to protect foreign patents will be granted at such time as the Marvel Carbureter Co. advises the Division of the necessity; (*g*) that as soon as the Army development is satisfactory and guarantee of deliveries can be made on the part of the Marvel Carbureter Co., a release for general manufacture will be granted by the Army Air Corps.

"2. As regards priority in connection with work on hand for the Army Air Corps, the following should govern: (1) Completion of the 9-cylinder fuel charger for the Pratt & Whitney SR-1340-C engine and the accompanying gear reduction housing and assembly; (2) completion of the 9-cylinder fuel charger for the Wright R-1820 engine; (3) design and submit for approval a 12-cylinder fuel charger for use on the Curtiss V-1570 engine and after approval of the above design, immediate construction thereof."

On March 21, 1931, the Matériel Division after considering the importance of the fuel-injector development to the national defense wrote the Marvel Carburetor Co. as follows:

"1. Reference is made to telephone conversation between Mr. Chandler and a representative of the Division on March 20, regarding the release of technical data pertaining to the fuel charger now under development.

"2. It is believed that the release of information which would enable a foreign manufacturer to parallel the development and application of the Marvel-Chandler fuel charger to aircraft engines, would not be to the best interests of the Air Corps at this time. The Division, therefore, has classified all documents, technical data, reports and devices pertaining to this development as 'secret,' which precludes demonstration and/or manufacture of it abroad. It also limits the commercial use of this device in the United States to specific applications which meet with the approval

of the War Department. The Matériel Division undertook this development with this understanding.

"3. It is the policy of both the War and Navy Departments to restrict the sale of articles of equipment that are of particular military value until they have been in production as standard articles for a period of approximately 1 year. In this particular case, however, it is believed that the Air Corps will be compensated for its support of this development if the release is withheld until the completion of a satisfactory service test. With this in view, every effort will be made to expedite experimental work now in progress and to incorporate the fuel charger on a limited number of engines for use in standard type airplanes as soon as the testing at the Division warrants it.

"4. It is further desired to state that there is no objection to your company proceeding with negotiations for the manufacture or licensing for manufacture, provided such negotiations do not violate the policy stated above relative to the release of any data or information that will enable duplication of the equipment now being tested, or incorporation of any of the principles pertaining to it.

"5. This cancels and supersedes all previous instructions from the Matériel Division pertaining to this development which are at variance with the foregoing."

On September 12, 1933, the Air Corps removed correspondence, telegrams, purchase orders, and contracts relating to fuel chargers from the secret classification. Further secrecy was required in respect of drawings, technical reports, and specifications. This information was conveyed to the Marvel Carbureter Co. by letter dated September 28, 1933, as follows:

"1. Effective immediately, the 'secret' classification, insofar as correspondence, telegrams, etc., are concerned, is removed from the project covering fuel chargers and related equipment, and purchase orders and contracts pertaining to this project.

"2. The 'secret' classification, however, will still apply to drawings, technical reports, and specifications."

On April 21, 1934, the Marvel Carbureter Co. was advised of a further change in the status of the development and the position of the Air Corps concerning domestic and foreign sales. This letter is as follows:

"1. Receipt is acknowledged of your communication of April 10, requesting information with respect to change in status of fuel injectors being made for the Government and also as to what information you may release to the Pan American-Grace Airways, Inc., pertaining to this equipment.

"2. Effective at once, the status of the subject project is changed from 'secret' to 'confidential', with the provision that it be continued on 'secret' status insofar as the policy relative to foreign and domestic sale is concerned. Specifications, drawings, and reports will be of 'confidential' status and marked accordingly.

"3. Documents marked 'confidential' will be prepared for transmission in the same manner as prescribed for 'secret' documents except that the inner cover will contain a receipt form only when the sender deems it necessary, and that the inner cover may be opened by some responsible person other than the persons addressed when so authorized.

"4. As set forth in policy covering 'Sale of Aeronautical Equipment abroad, a copy of which has previously been furnished to you, it is the policy of the War and Navy Departments to encourage American aeronautical industry in developing foreign business. The policy also quotes the following statement: 'No negotiations for the sale abroad of aeronautical equipment which has been developed for or with the assistance or direct encouragement of the War or Navy Department or whose usefulness is primarily or exclusively military, should be initiated without the permission of the Department interested.' While the Government cannot favorably at this time consider the release of this equipment for foreign sale, it feels that if you are not permitted to release technical data on this equipment and enter into preliminary negotiations for domestic sale of the equipment that it will be creating a trade disadvantage due to the fact that other manufacturers have marketed similar devices.

"5. The Government accordingly authorizes you to divulge to the Pan American-Grace Airways, Inc. such technical information as will enable them to determine the merits of this equipment and permit them to initiate negotiations regarding possible purchase for domestic use only. This authority is granted with the understanding that negotiations for the sale of this equipment will not be closed without approval of the Government. While the Matériel Division cannot assure you at this time that authority will be given for the domestic sale of this equipment, we feel sure that authority for domestic sale will be granted by the Government. No steps, however, will be taken to obtain this approval until this Division is further advised in the matter with respect to your negotiations with the Pan American Airways, Inc."

On August 8, 1934, a conference was held at Wright Field, regarding the Marvel fuel charger. A report of this conference was made and is enclosed herewith, marked "Enclosure No. 1." On August 18, 1934, the Marvel Carbureter Co. addressed a letter to the Air Corps at Wright Field in which it expressed its position in reference to amortizing its developmental costs. A copy of this letter is enclosed and marked "Enclosure No. 2."

On August 31, 1934, the Matériel Division advised the Marvel Carbureter Co. of its policy concerning domestic and foreign sales. (See enclosure No. 3.)

On October 3, 1934, the Matériel Division wrote to the Chief of the Air Corps enclosing a copy of the Marvel Carbureter Co.'s letter of August 18, 1934. (See enclosure No. 4.)

On October 12, 1934, the Office of the Chief of the Air Corps addressed the following letter to the Matériel Division:

"1. In order that General Foulois may take up this matter of foreign sale of Marvel fuel injectors with higher authority, it is requested that the following be furnished: (*a*) A brief statement of the advantages of fuel injectors over present-type carburetors; (*b*) a report on the service test of the 12 Marvel fuel injectors referred to in paragraph

5 of your letter of October 3, 1934; (*c*) a report on changes required in present-type engines if fuel injection is specified for 1936 procurement, and effect on future cost per engine (*d*) a report on steps already taken by the Division committing the Air Corps to fuel injection for 1936 procurement; (*e*) report on steps taken to install fuel-injector engines on P-26 airplanes."

After receiving the information required the Office of the Chief of the Air Corps advised the Matériel Division by first endorsement dated January 24, 1935, as follows:

"1. In the light of such information as has been forwarded the Chief of Air Corps, the Marvel fuel-injection system and its application to aviation is a marked advance. It is superior to any similar effort that has come to his attention. Its possession promises to be of great advantage to the Army Air Corps. In case of an emergency the utilization of this device may contribute greatly to the superioity of Army equipment over that of an aggressor. It, therefore, is desirable that this important device be held for the exclusive use of the armed forces of the United States as long as such an advantage can be enjoyed. Release for domestic and export sales cannot be granted at this time.

"2. Competition is desirable. Efforts should be exerted to obtain such competition through the establishment of a policy for the procurement of fuel-injection systems following the principles outlined in policy No. 164, dated January 22, 1935."

On March 16, 1935, the Marvel Carburetor Co. again brought up the matter of recouping its losses. (See enclosure No. 5.) The Air Corps' reply dated May 18, 1935, is enclosed, marked "Enclosure No. 6."

On April 22, 1935, the Matériel Division in a letter to the Chief of the Air Corps first raised the question of requesting the State Department to prohibit the export of injection devices for non-Diesel-type engines. In submitting the matter to The Adjutant General, authority was requested to negotiate a license with the Marvel Carburetor Co. (See Enclosure No. 7.)

On May 31, 1935, the office of The Assistant Secretary of

War authorized the Chief of the Air Corps to negotiate for a license under the Marvel patents. In a letter dated July 28, 1936, the Marvel Carbureter Co. offered to grant a license for $900,000. This offer was not accepted.

The result of the development work was to produce a fuel injector which functioned very satisfactorily on a 9-cylinder engine, but by the time this was completed the 9-cylinder engine had been superseded by 12-, 14-, and 18-cylinder engines. Experimental work continued for some time in an attempt to develop a fuel injector that would produce satisfactory results with the larger engines. In the meantime other concerns were working on the same problem. The possibility of substituting the fuel injector for the carburetor stimulated development in the latter art. As a result the Air Corps adopted a policy of combining this development with engine development. This course was required inasmuch as the Air Corps could not secure fuel injectors to supply engine contractors for installation on completed engines.

As stated heretofore, the War Department has not committed itself on the question of liability from an equitable standpoint for the expenditure made by the Marvel Carbureter Co. on the fuel-charger project. If the Congress sees fit to have this question presented to the Court of Claims for determination, the War Department has no objection to such procedure. Objection is raised, however, to the basis upon which the present bill predicates the claim. That is, the bill authorizes the court to render judgment for such sum as may be found to be equitably due for the taking and impounding under the Espionage Act of all matters pertaining to the development of fuel-injection systems for use on military aircraft.

The War Department believes that it should be contrary to public policy to use the Espionage Act to create a claim against the Government. The Espionage Act is a criminal statute which prohibits the doing of the acts enumerated therein. It is an act to augment the national defense.

So far as the War Department is informed, the Marvel Carbureter Co. did everything in its power to maintain secrecy concerning the fuel-injector development. In other

words, it did not violate the Espionage Act. But it is the view of the War Department that a compliance with a criminal statute should not create a claim against the Government. Under the Neutrality Act a license must be secured from the Secretary of State to export certain implements of war. Would the Congress recognize a claim for lost profits occasioned by the refusal to grant a license to export implements of war? The recognition of such a claim would appear to be contrary to public policy. So in this case it is the view of the War Department that the claim should not be based upon any alleged taking or impounding under the Espionage Act.

The only question is whether, under all of the facts, the Government is morally and equitably liable for money expended by the Marvel Carburetor Co. in the development of fuel chargers which has not been recovered by the sale of the developed product.

As so limited the War Department has no objection to the reference of the matter to the Court of Claims for determination.

Sincerely yours,

HARRY H. WOODRING,
Secretary of War.

(2154)

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QUESTION PRESENTED

Whether the Court of Claims erred in holding that the facts of this case did not give rise to a contract implied in law, a category to which the court's jurisdiction was here extended by a special jurisdictional act, between petitioner and the United States.

STATUTE INVOLVED

The special jurisdictional act (Private Law 126, 76th Congress, 1st Session, 53 Stat. 1491), pursuant to which petitioner brought this action in the court below, reads as follows:

AN ACT

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claim of the Borg-Warner Corporation

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and render judgment in such amount as it deems may be equitably due, notwithstanding the lapse of time, or any statute of limitations, or any limitation upon the jurisdiction of such court with respect to claims upon any contract implied in law, upon the claim of the Borg-Warner Corporation, in

its own right and as successor to the Marvel Carbureter Company (formerly a wholly owned subsidiary of the Borg-Warner Corporation), against the United States in connection with the development of fuel-injection systems for use on military aircraft: *Provided, however,* That such damages shall not exceed the actual moneys expended by the said Borg-Warner Corporation and the Marvel Carbureter Company in connection with this said development during the calendar years 1927 to 1936, inclusive.

Sec. 2. Such claim shall be instituted by or on behalf of the Borg-Warner Corporation within one year after the date of the enactment of this Act. Proceedings in any suit before the Court of Claims under this Act, and review thereof and payment of any judgment therein, shall be had as in the case of claims over which such court has jurisdiction under section 145 of the Judicial Code, as amended.[1]

STATEMENT

Petitioner, Borg-Warner Corporation, is the successor in interest to the Marvel Carbureter Company of Illinois, which in turn was the successor in interest to an Indiana corporation also bearing the title of Marvel Carbureter Company (R. 11-12). This is a suit by petitioner, in its own

[1] Section 145 of the Judicial Code has been reenacted as 28 U. S. C. 1255.

right and as successor to Marvel,[2] to recover for expenditures incurred in the development of fuel-injection systems for use on military aircraft.

In December, 1914, one Milford Chandler was granted a United States patent on a "Fluid-distributing Mechanism" (R. 14). The Chandler injector system, designed to eliminate carburetors on gas engines and to inject the fuel directly into the cylinders of engines, was peculiarly adaptable to aircraft engines (R. 13). In July, 1926, Chandler and Marvel, whose principal business was the manufacture and sale of carburetors, entered into an arrangement for the further development of Chandler's device (R. 14). Under the agreement the company was granted the exclusive right to manufacture and sell the device, and Chandler was paid a salary to carry on further experimental work (R. 14-15). After approximately ten months, Marvel decided to discontinue the project and terminated its contract with Chandler (R. 17). The company then wrote a letter to the Air Corps suggesting that it enter into some sort of arrangement with Chandler for the further development of his invention (R. 17). Chandler, on his own behalf, then conferred with Air Corps representatives in an effort to induce them to develop and build injector systems which he would design (R. 17). The Air Corps was not interested, however.

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[2] We shall use the name "Marvel" to refer to either or both Marvel Carburetor Company of Illinois and Marvel Carburetor Company of Indiana.

It told Chandler that it was interested only in developing sources of supply for such a device, and advised him to induce Marvel to resume its efforts to perfect the device, with his help (R. 17). Accordingly, Marvel reemployed Chandler and experimental work on the injector system was resumed (R. 18).

A short time later, the Air Corps purchased an injector mechanism from Marvel, and, after making bench tests of it, suggested to Marvel certain improvements to be included in future devices (R. 18). Between 1927 and 1936, Marvel worked on the device with the aid and cooperation of the Air Corps. During this time it sold the Air Corps and the United States Navy fuel injectors and parts in the total sum of $248,736.78 (R. 18). Marvel did not sell any fuel injection systems to the Air Corps after 1936 (R. 30). Meanwhile the carburetor manufacturers perfected the "floatless carburetor," a mechanism which eventually superseded fuel injection systems, since it eliminated the difficulties formerly inherent in carburetors used for aviation purposes (R. 33).

During the development period, the Air Corps considered the development of Chandler's invention of great importance. It wrote Marvel that it wished "to impress on the Marvel Carbureter Company the desire or demand for developing this project with the utmost haste" (R. 18). In March, 1931, the Wright Field Procurement Division

wrote Marvel that in the interest of security and in order to preclude a foreign manufacturer from developing a similar injection system it had "classified all documents, technical data, reports and devices pertaining to this development as 'Secret,' which precludes demonstration and/or manufacture of it abroad. It also limits the commercial use of this device in the United States to specific applications which meet with the approval of the War Department." (R. 20.) In November, 1932, and subsequently, the Air Corps called attention to the fact that unauthorized disclosure of information so classified was subject to fine and imprisonment under the Espionage Act, 40 Stat. 217, 50 U.S.C. 31 et seq. (R. 21).

In August, 1934, a conference was held between representatives of Marvel and the Materiel Division of the Air Corps (R. 22). Prior to this date the Government had procured fuel injectors by direct purchase from the company. At this conference the Air Corps representatives indicated that thereafter procurement of fuel injectors would be obtained through engine manufacturers on the basis of competitive bidding. (R. 22.) Marvel protested this by letter of August 18, 1934, to the Air Corps, stating that "we have a large investment in this project and have not had, due to your department having impounded same as an Army secret, an opportunity to do any manufacturing on a production basis" (R. 23-24). The letter further asked for a release from secrecy, stating that "this re-

quest for a complete release from secret development is forced upon us at this time by the Government asking us to compete on price before we have had an opportunity to amortize our present outstanding deficit" (R. 24). In October, 1934, the Air Corps informed Marvel that its letter had "been forwarded to higher authority since it is a matter that relates to the general policy of releasing equipment for foreign sales" (R. 26). Another conference was held in January, 1935, at Wright Field and the company was advised that procurement of fuel injectors for 1935 and 1936 would be thrown open to competitive bidding (R. 27). Marvel made further protests under letters of March 16, 1935 (R. 27-28), and May 19, 1936 (R. 29-30), and again requested that the device be released from secrecy. The War Department, in December, 1937, advised petitioner, as the successor to Marvel, that the development was no longer considered to be in a secret status (R. 31).

Petitioner's final protest to the War Department was made on January 27, 1938. After making reference to the secrecy status under which Marvel had to operate and its consequent inability to negotiate for outside business, petitioner made demand on the War Department for the payment of $506,320.75 allegedly due for money, labor and materials expended on the development, over and above the money received from the Government for the injectors supplied the Government under its purchase orders and contracts (R. 31-32). The

War Department rejected this claim, being of the opinion that it was "wholly untenable" (R. 32). Petitioner then brought this action, pursuant to the special jurisdictional act of August 4, 1939, *supra*, pp. 2-3 (R. 12). Contending that it had incurred net expenditures of $735,526.28 in development work on the injector system, petitioner filed a claim for that amount in the court below (R. 1-9). Petitioner alleged that the Government "received through such experimental and development work, among other invaluable benefits, the design and development of said device; the great and invaluable benefit involved in the determination that said fluid distributing mechanism constituted a marked advance over carburetion for military aircraft and the availability of the mechanism for use on military aircraft used in National Defense." (R. 7). The Court of Claims dismissed the petition (R. 38), holding that there was no contract implied in fact or in law between the parties since there was no promise, express or implied, to pay petitioner its losses and no fraud, misrepresentation, mistake or the like had been shown. (R. 37, 38).

ARGUMENT

1. The special jurisdictional act pursuant to which petitioner brought this action conferred jurisdiction upon the Court of Claims "to hear, determine, and render judgment in such amount as it deems may be equitably due, notwithstanding * * * any limitation upon the jurisdiction of such

court with respect to claims upon any contract implied in law, upon the claim of [petitioner] * * * against the United States in connection with the development of fuel-injection systems for use on military aircraft * * *", *supra,* pp. 2-3 (R. 12). The principal issue here, as both the court below (R. 35) and petitioner (Pet. 9, 19, 21) recognize, is whether the proof established a contract implied in law between the parties. The Court of Claims found that the dealings between the parties gave rise to no such implied contract. We submit that that determination, based in the main on factual considerations, is plainly correct and does not warrant review.

Petitioner contends (Pet. 9, 18, 21, 24) that the Government was unjustly enriched as a result of its experimental work on fuel-injection systems.[3]

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[3] As petitioner recognizes (Pet. 18), the measure of any recovery would be the benefit to the Government. Petitioner's alleged out-of-pocket loss is, in accordance with the terms of the special act, not the measure of but a limitation on the amount of recovery. Thus petitioner no longer presses the claim of $735,526.28, the sum claimed in the court below (R. 7-8) as representing its net loss on the project. Moreover, it seems doubtful that Marvel suffered any out-of-pocket loss. The court below found that "equal benefits inured to the Marvel Company from the Marvel-Chandler project insofar as the 'know how' of fuel-injection systems was concerned" (R. 33); that "the Marvel Company received an additional benefit in that during the experimental or development period it built up a patent situation or monopoly" (R. 33); that "when the Marvel Company offered to license the Government under its patents on July 28, 1936 * * * it placed a value of $900,000 on such license" (R. 34).

Petitioner states (Pet. 8, 21) that the benefits received by the Government from the development program were the "know-how" of fuel injection systems, the basic data necessary for the formulation of performance specifications for such systems, increased national security which the device furnished against potential aggressors, the saving of development costs, and the indirect benefit resulting from the stimulation given to carburetor manufacturers when fuel-injection systems appeared as a threat to their industry.[4] We think it highly doubtful that any such intangible advantages could be considered an enrichment of the United States, as that term is used in the law of quasi contracts. Assuming, however, that such nebulous benefits constituted an enrichment, and apart from the extreme difficulty of evaluating such benefits, the Government is under no duty to make restitution. The mere fact that a person has been benefited is not enough. It must also be shown that the retention of such benefit is unjust. *Bailis*

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[4] Petitioner also alleges that the Air Corps used a fuel-injection system, not manufactured or sold by petitioner or Marvel, on its B-29 airplanes during the war, and that this device was manufactured and supplied in accordance with the preformance specifications resulting from the Marvel-Chandler development work. The conclusive answer to this is, as noted by the court below (R. 38), that the complaint did not "allege that the system used infringed plaintiff's patents. * * * No claim for an infringement of the Chandler patent having been made, we are unable to see how any liability arises by reason of the fact that some non-infringing device was used on these airplanes."

v. *Reconstruction Finance Corporation,* 128 F. 2d 857 (C.A. 3); *Chandler* v. *Washington Toll Bridge Authority,* 17 Wash. 2d 591, 137 P. 2d 97; *Restatement of Restitution,* § 1, comment c.

It is clear that the benefits allegedly conferred on the Government were not conferred as the result of mistake, or of misrepresentation, fraud or coercion on the part of the Government, and petitioner does not so contend. Nor does the Government's imposition of secrecy on the project and the consequent inability of Marvel to sell the device in the open market on a mass production basis create any basis for liability. The imposition of secrecy restrictions was an exercise of the sovereign power of the Government, authorized by the Espionage Act (R. 20, 21). The United States is plainly not liable for losses resulting from such an exercise of government power. *Horowitz* v. *United States,* 267 U. S. 458; *Lynch* v. *United States,* 292 U. S. 571, 579; *Gothwaite* v. *United States,* 102 Ct. Cls. 400; *Standard Accident Insurance Company* v. *United States,* 103 Ct. Cls. 607, certiorari denied, 326 U. S. 729. Compare *Patterson* v. *Kentucky,* 97 U. S. 501, sustaining a state statute which prevented the assignee of a patent from recouping his original investment on commercial sales of a product which had been commercially developed under the patent. See also *Chandler* v. *Washington Toll Bridge Authority, supra.* Even assuming, there-

fore, that there was some benefit to the Government, it cannot be argued that the retention of the benefit was unjust.

Petitioner's protestations to the contrary, there is nothing particularly novel about the situation presented here. Any expenditures made by petitioner were incurred in a project which was undertaken in the hope of securing large orders from the War Department and thereby reaping considerable profits. For purposes of the law of quasi-contracts, such expenditures are not to be viewed as conferring a benefit on the Government for they are primarily made in petitioner's own behalf. "The contingent remuneration expected was large enough to induce [petitioner] to render [its] services purely in the hope of receiving it and [petitioner] must have known that payment was contingent on success." *Federal Royalty Co.* v. *Knox*, 114 F. 2d 78, 80 (C. A. 5). Accordingly, the law consistently denies recovery for work done and expenses incurred in anticipation of entering into a contract. *Mergenthaler* v. *Dailey*, 136 F. 2d 182 (C. A. 2); *Sickelco* v. *Union Pacific R. R. Co.*, 111 F. 2d 746, 750 (C. A. 9); *Restatement of Restitution*, §§ 56, comment c, and 57, comment b.

2. Petitioner makes the secondary argument (Pet. 12-14) that the lower court ignored the clear mandate of the Congress to determine the amount "equitably due." Petitioner states that "the Congress must have felt that the government was 'mor-

ally and equitably liable' and that it intended to give the Court a mandate to determine the amount, if any, by which the money expended by Marvel exceeded its sales 'of the developed product' ". (Pet. 14). This is the argument, often made in connection with special jurisdictional acts, that the act conceded the liability of the Government, and that all that remained for the Court of Claims to do was to assess petitioner's net loss. This argument is inconsistent with petitioner's main contention that the basis for recovery is not the net loss to it but the asserted benefit to the Government: "the basis for claim under the Jurisdictional Act is that respondent received a benefit for which, in view of the circumstances, it should make restitution," that "the present action is based upon the benefit to respondent * * *" (Pet. 18). Moreover, it is well settled that special acts conferring jurisdiction on the Court of Claims to render judgment on claims "equitably" due do not concede liability on the part of the defendant, but merely provide a forum for the presentation and adjudication of the case according to applicable legal principles. *United States* v. *Mille Lac Chippewas,* 229 U. S. 498, 500; *The Sac and Fox Indians,* 220 U. S. 481, 489; *Tillson* v. *United States,* 100 U. S. 43, 46; *Coos Bay Indian Tribe* v. *United States,* 87 Ct. Cls. 143, 153, certiorari denied, 306 U. S. 653; *Iowa Tribe of Indians* v. *United States,* 68 Ct. Cls. 585, 605. That this was the intention of Congress is perfectly plain from

the title of the Act (*supra*, p. 2) which states that its purpose is "to confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claim of the Borg-Warner Corporation," and from its legislative history. (See pp. 33 and 43 of the Appendix to petitioner's brief).

CONCLUSION

The decision of the court below is clearly correct and there is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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